COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-154

COMMONWEALTH

vs.

RICARDO VALENTIN.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

On appeal from his conviction for murder in the second degree, the defendant claims that the trial judge made multiple errors in the jury instructions and that she erroneously excluded evidence of his statement to a witness and portions of his statement to the police. We affirm.

1. Jury instructions. a. Supplemental instruction on sudden combat. The defendant claims error in the judge's supplemental instruction on mitigation by reason of sudden combat. During deliberations, the jury sent a question: "Is there a precise or clear definition of quote/unquote 'sudden assault,' beyond what is provided in the charge? If yes, can we hear it?" The phrase "sudden assault" appeared only a single time in the judge's instructions, in the portion discussing

sudden combat.[1] Over the defendant's objection, the judge answered the jury as follows:

> "Mutual combat or sudden assault is defined as one into which both parties enter willingly. Or in which two

[1] The defendant does not challenge the judge's initial instruction on sudden combat, which he concedes was consistent with the Model Jury Instructions on Homicide § 2.5(2) (2018). The original instruction on sudden combat, in full, was as follows:

> "Sudden combat involves a sudden assault by the deceased and the defendant upon each other. In sudden combat, physical contact, even a single blow, may amount to reasonable provocation. Whether the contact is sufficient will depend on whether a reasonable person, under similar circumstances would have been provoked to act out of emotion rather than reasoned reflection on whether the defendant was in fact so provoked.
>
> "The heat of passion induced by sudden combat must also be sudden. That is the killing must have occurred before a reasonable person would have regained control of his emotions and the defendant must have acted in the heat of passion without cooling off at the time of the killing.
>
> "If the Commonwealth has not proved beyond a reasonable doubt the absence of heat of passion induced by sudden combat, the Commonwealth has not proved that the defendant committed the crime of murder.
>
> "In summary, a killing that would otherwise be murder is reduced to the lesser offense of voluntary manslaughter if the defendant killed someone because of heat of passion induced by sudden combat. The Commonwealth has the burden of proving beyond a reasonable doubt the defendant did not kill as a result of heat of passion and induced by sudden combat.
>
> "If the Commonwealth fails to meet this burden, the defendant is not guilty of murder, but you are required to find the defendant guilty of manslaughter if the Commonwealth has proved the other required element[s]." (Emphasis added.)

> persons, upon sudden quarrel, [a]nd in hot blood mutually fight upon equal terms.
>
> "Two conditions must be satisfied as well. One, the accused cannot have instigated the fight; and two, retaliation by the accused must not be disproportionate to the provocation."

The language of this instruction was derived from a definition of mutual combat under Illinois law, as provided in United States ex rel. Bacon v. DeRobertis, 551 F. Supp. 269 (N.D. Ill. 1982). The phrase "sudden assault" does not appear in the case.

The defendant argues that this supplemental instruction "neither elucidated nor was consistent with Massachusetts case law," and therefore was improper. "Where, as here, a defendant raises a timely objection to a judge's instruction to the jury, we review the claim for prejudicial error." Commonwealth v. Kelly, 470 Mass. 682, 687 (2015). In reviewing the defendant's claim, we are mindful that "[t]he proper response to a jury question must remain within the discretion of the trial judge, who has observed the evidence and the jury firsthand and can tailor supplemental instructions accordingly." Commonwealth v. Waite, 422 Mass. 792, 807 n.11 (1996). A judge's discretion to formulate such a response is broad. See id. When providing supplemental instructions in response to jury questions, judges "need not repeat all or any part of the original instructions." Commonwealth v. Stokes, 440 Mass. 741, 750 (2004). "The judge's additional instructions, . . . although delivered after a period

of jury deliberation, must be read in light of the entire charge." Commonwealth v. Sellon, 380 Mass. 220, 233-234 (1980).

Here, the jury, which had with them the written jury instructions, sought a clearer definition of the phrase "sudden assault." Finding "nothing in Massachusetts other than the plain meaning of the word[s]," the judge puzzlingly resorted to a United States District Court case defining "mutual combat" for purposes of Illinois State law to provide a response to the jury's question.[2] The judge's response to the jury constituted error.

We have found no requirement in Massachusetts law, nor has the Commonwealth suggested any, that parties must enter into sudden combat "willingly," or fight upon "equal terms," a phrase whose meaning is itself somewhat elusive. Certainly, the comparative attributes of the parties involved may be a factor considered in determining whether an incident constitutes sudden combat. See, e.g., Commonwealth v. Bianchi, 435 Mass. 316, 329 (2001) (no adequate provocation where victim called defendant

[2] A judge "risks much mischief by going beyond the facial content of a deliberating jury's question in an effort to provide assistance on a subject that he or she infers is 'really' troubling them." Commonwealth v. Murphy, 57 Mass. App. Ct. 586, 593 (2003). Among the alternatives available to the judge in responding to the jury's question here were declining to give any instruction exceeding the already-provided sudden combat instruction, or providing dictionary or Massachusetts legal definitions in accordance with the "plain meaning" of the words in the phrase.

obscenity and punched defendant in face, where defendant was weightlifter, outweighed victim by over 170 pounds, was armed, and was violating protective order in pursuing victim); Commonwealth v. Parker, 402 Mass. 333, 344-345 (1988) (allegation of two blows struck by seventy-nine year old handicapped victim insufficient evidence of sudden combat); Commonwealth v. Walden, 380 Mass. 724, 726 (1980) (several blows by eighty-four year old victim and scratches from second victim insufficient evidence of sudden combat). Nonetheless, there is no strict requirement of "equality" between the combatants at issue.

Similarly, under our law of sudden combat, proportionality of response is not a necessary element of the defense, but is instead a factor often considered in analysis of the issue.[3] See, e.g., Commonwealth v. Ruiz, 442 Mass. 826, 839 (2004) (no sudden combat instruction merited where victim slapped and jumped on defendant, which "presented no threat of serious harm to him"); Commonwealth v. Garabedian, 399 Mass. 304, 313-314 (1987) (scratches to face of male attacker by woman victim was evidence "hardly of a type which would entitle the defendant to an instruction on voluntary manslaughter"); Commonwealth v.

[3] The Commonwealth conceded at oral argument that inclusion of this requirement in the supplemental instruction was an inaccurate statement of Massachusetts law.

Brown, 387 Mass. 220, 227 (1982) (evidence that victim choked husband with shirt insufficient, where husband stabbed wife twenty-seven times).

As to the requirement in the supplemental instruction that a defendant not have "instigated" the fight, it is true that "provocation must come from the victim," Ruiz, 442 Mass. at 838-839, and "the victim generally must attack the defendant, or at least strike a blow against the defendant in order to warrant a manslaughter instruction." Commonwealth v. Lugo, 482 Mass. 94, 104-105 (2019). Passing on the question whether this instigation requirement was precisely correct as stated, as discussed infra, any error in this portion of the supplemental instruction was without prejudice.

In reviewing an error for prejudice, we "inquire[] whether there is a reasonable possibility that the error might have contributed to the jury's verdict." Commonwealth v. Wolfe, 478 Mass. 142, 150 (2017), quoting Commonwealth v. Alphas, 430 Mass. 8, 23 (1999) (Greaney, J., concurring). In doing so, we examine the jury instructions as a whole, as well as the strength of the Commonwealth's case. See Commonwealth v. Asher, 471 Mass. 580, 590 (2015). We discern no prejudice from the erroneous supplemental instruction here.

The record as a whole, but particularly the video recording (video) of the stabbing, presents strong evidence that the

defendant did not kill the victim as a result of heat of passion induced by sudden combat. In the video, the two walk down the street, exchanging heated words, with the victim demanding repeatedly that the defendant "take off" his knife. The two square off, the victim in a fighting stance with his hands raised in fists. A third party separates the two for a few moments as they continue exchanging words. Then the victim takes a quick step toward the defendant, and takes a fighting stance again. The victim pauses for a moment, and the defendant then lunges toward him, stabbing him a single time before the victim flees, with the defendant chasing after him.

The record "contains nothing to suggest that the defendant ever experienced a moment of such sudden passion that his capacity for self-control was eclipsed," Commonwealth v. Benson, 453 Mass. 90, 97 (2009), nor does it depict any objectively reasonable provocation sufficient to justify the defendant's actions. See Commonwealth v. Groome, 435 Mass. 201, 220 (2001) (defendant's actions must be "both objectively and subjectively reasonable"). The video reflects that, though the two engaged in a heated conflict, the victim did not strike the defendant, and, indeed, that the victim paused for a moment before the defendant stabbed him.

Additionally, and importantly, "[t]he fight was not sudden and unexpected, but rather . . . prepared for by the defendant.

The deadly weapon was not carried incidentally, but was brought purposely to the fight for protection." Commonwealth v. Gaouette, 66 Mass. App. Ct. 633, 641 (2006). According to the defendant's own statement, before proceeding to High Street -- the location of the fight -- that day, the defendant was told that the victim, who "knows a lot of people," was looking for him and wanted to jump him, and that the victim would be on High Street that day. The defendant "armed himself in preparation for a fatal confrontation and, carrying a . . . deadly weapon, went to a location where he knew he would find the victim[]. Although [the defendant] may have feared the victim[], he sought [him] out." Commonwealth v. Clemente, 452 Mass. 295, 321 (2008) (defendant ineligible for manslaughter instruction). "Courts are reluctant to find mitigation . . . on a lesser included offense when the defendant confronts the victim while armed with a deadly weapon." Commonwealth v. Vick, 454 Mass. 418, 429 (2009). See Commonwealth v. Rodriquez, 461 Mass. 100, 108-109 (2011), quoting Walden, 380 Mass. at 727 ("'physical contact between a defendant and a victim is not always sufficient to warrant a manslaughter instruction' . . . . This is particularly so when a defendant is armed with a deadly instrument and a victim is not").

Based on our review of the record, we are confident that "the jury would have inevitably reached the same result if the

judge had omitted the challenged instruction." Wolfe, 478 Mass. at 151, quoting Commonwealth v. Buiel, 391 Mass. 744, 747 (1984). The error does not require reversal.

b. Reasonable provocation. The defendant additionally challenges the judge's refusal of his request to instruct the jury on reasonable provocation. For a reasonable provocation instruction to be appropriate, "[t]here must be evidence that would warrant a reasonable doubt that something happened which would have been likely to produce in an ordinary person such a state of passion, anger, fear, fright, or nervous excitement as would eclipse his capacity for reflection or restraint, and that what happened actually did produce such a state of mind in the defendant." Commmonwealth v. Avila, 454 Mass. 744, 768 (2009), quoting Walden, 380 Mass. at 728. "[S]udden combat is among those circumstances constituting reasonable provocation," and accordingly, "much of our case law treats them indistinguishably." Commonwealth v. Camacho, 472 Mass. 587, 601 n.19 (2015), quoting Commonwealth v. Walczak, 463 Mass. 808, 820 (2012) (Lenk, J., concurring). "Reasonable provocation," however, "encompasses a wider range of circumstances likely to cause an individual to lose self-control in the heat of passion than does sudden combat." Commonwealth v. Howard, 479 Mass. 52, 58 (2018).

The defendant argues that the victim's threatening words and gestures were sufficiently confrontational and inflammatory that they merited a separate instruction on reasonable provocation, relying substantially on language in Howard, supra at 58-62. The defendant's reliance on Howard is inapposite, as it was decided after trial in this case. See Commonwealth v. Bastaldo, 472 Mass. 16, 31 (2015) ("[W]e evaluate the alleged errors under the existing law at the time of trial"). Regardless, the defendant has failed to identify conduct not covered under sudden combat that merited a reasonable provocation instruction.

To the extent that the victim was verbally aggressive to the defendant in the minutes immediately preceding the stabbing, such conduct does not support a reasonable provocation instruction. See Commonwealth v. Carrion, 407 Mass. 263, 267 (1990), quoting Commonwealth v. Zukoski, 370 Mass. 23, 28 (1976) ("Insults or quarrelling alone cannot provide a reasonable provocation"). Here, particularly, we also note that the victim's aggressive language was in the context of his demands that the defendant drop his knife.

The record additionally fails to reflect any evidence that the victim made a threatening gesture of a nature which has been held to give rise to a reasonable provocation instruction. See, e.g., Commonwealth v. Little, 431 Mass. 782, 785, 786-787 (2000)

(reasonable provocation where victim, who was known to carry gun, threatened defendant and "made a motion like he was going for his hip," which defendant believed was attempt to draw his gun). Though the defendant stated that he believed the victim had a gun, "because people on the street . . . everyone always has a gun," there was no evidence in the record that the victim made any gesture as though to reach for a gun, or that the victim otherwise indicated that he intended to use a gun at the time the defendant stabbed the victim. The judge did not err in declining to give a reasonable provocation instruction.

c. Excessive use of force in self-defense. The judge in her instructions mistakenly omitted the following paragraph of the model instructions describing excessive use of force in self-defense:

> "If the Commonwealth proves that the defendant did not act in proper self-defense . . . solely because the defendant used more force than was reasonably necessary, then the Commonwealth has not proved that the defendant committed the crime of murder but, if the Commonwealth has proved the other required elements, you shall find the defendant guilty of voluntary manslaughter."

See Model Jury Instructions on Homicide, supra at § 2.5(3). After the instructions, the defendant requested a supplemental instruction on excessive use of force in self-defense drawn from Commonwealth v. Grassie, 476 Mass. 202, 210 (2017). The judge declined, indicating her mistaken belief that she had "given the S[upreme] J[udicial] C[ourt] approved instructions . . . and

that [she] used the exact instructions." The defendant did not correct this misapprehension.

The defendant argues that, because of this omission, the jury could have found that the Commonwealth failed to prove that the defendant acted in self-defense only because he used excessive force in stabbing the victim. Assuming without deciding that the defendant's claim was preserved, there was no prejudicial error. When reviewing a judge's instructions to a jury, "[w]e evaluate the instruction as a whole, looking for the interpretation a reasonable juror would place on the judge's words." Commonwealth v. Niemic, 427 Mass. 718, 720 (1998), quoting Commonwealth v. Trapp, 423 Mass. 356, 361 (1996).

The judge fully and properly instructed the jury on self-defense. She then instructed the jury multiple times that it was the Commonwealth's burden to prove the lack of mitigating circumstances, and if it proved the required elements of murder, but failed to prove a lack of mitigating circumstances, the defendant must be found guilty of voluntary manslaughter. The judge instructed the jury that they must consider two categories of mitigating circumstances, and that one of them was excessive force in self-defense. She then properly described excessive force in self-defense, and enumerated the factors to consider in evaluating the reasonableness of the defendant's conduct. Given the charge as a whole, there was no prejudicial error.

d. Mistaken belief. Without objection, the judge omitted the portion of the model instructions dealing with mistaken but reasonable belief in self-defense. The defendant argues that this omission was erroneous, because there was evidence that he had a mistaken but reasonable belief that the victim had a gun. Because the defendant did not object to the omission of the instruction, we review for a substantial likelihood of a miscarriage of justice, and find none. See Commonwealth v. Glacken, 451 Mass. 163, 166 (2008). "[T]he judge told the jury on the question of self-defense that they should consider whether the defendant was about to be physically attacked or reasonably believed that he was about to be physically attacked. That instruction, repeated in substance more than once, covered the concept of a mistaken but reasonable belief" (emphasis added). Commonwealth v. Glass, 401 Mass. 799, 809 (1988).

e. Involuntary manslaughter. Prior to the close of evidence, the trial judge denied the defendant's request for a jury instruction on involuntary manslaughter. The defendant did not subsequently renew his request or otherwise revisit the issue. He now argues that omission of the instruction constituted reversible error.

"Involuntary manslaughter is defined as an unlawful homicide unintentionally caused by an act that constitutes such a disregard of the probable harmful consequences to another as

to amount to wanton or reckless conduct." Commonwealth v. Jones, 382 Mass. 387, 389 (1981). The defendant contends that the jury had a basis to believe that he acted wantonly or recklessly, based on his statement to police that when he stabbed the victim, he was merely "swinging [his knife] wildly" without the intent to kill him.

Assuming without deciding that the issue was preserved, and that the omission of the instruction was error, there was no prejudice from the omission of the instruction. The evidence that the stabbing was intentional was overwhelming. The victim's stab wound was one inch long, and almost seven inches deep, and the video depicting the stabbing, as described above, provides robust evidence that the homicide was voluntary.

2. Defendant's statements. a. Statement to girlfriend. While cross-examining the defendant's former girlfriend, defense counsel attempted to elicit that, after the offense, the defendant had told her that he "felt like [the victim] was the one that was going to do it to [him]." The Commonwealth's objection to the question was sustained. On appeal, the defendant argues that the statement was evidence of his state of mind, and thus relevant to his claim of self-defense. At the time of the objection, "[w]hen the judge noted that the statement was hearsay, the defendant made no claim, as he now does, that the state of mind exception to the hearsay rule

applied. The issue argued to us was not properly preserved for appellate review and does not involve a substantial likelihood of a miscarriage of justice." Commonwealth v. Casavant, 426 Mass. 368, 369-370 (1998). Regardless, the statement was inadmissible hearsay. "An extrajudicial statement of a declarant is not ordinarily admissible if it is a statement of memory or belief to prove the fact remembered or believed." Commonwealth v. Lowe, 391 Mass. 97, 104 (1984). The defendant's self-serving out-of-court statement relaying his own belief about the victim was not admissible to prove the matter asserted. There was no error.

b. Statement to police. The defendant argues that his statement to police was, in part, unfairly redacted in a manner prejudicial to the defense. He contends that redacted portions of the statement should have been admitted under the doctrine of verbal completeness, and that his statements were admissible hearsay because they were relevant to prove the defendant's state of mind.

"Under the doctrine of verbal completeness, '[w]hen a party introduces a portion of a statement or writing in evidence,' a judge has the discretion to 'allow[] admission of other relevant portions of the same statement or writing which serve to "clarify the context" of the admitted portion.'" Commonwealth v. Aviles, 461 Mass. 60, 75 (2011), quoting Commonwealth v.

Carmona, 428 Mass. 268, 272 (1998). "The rule is limited; the defendant cannot compel the admission of an entire statement simply because the Commonwealth offers a part of it." Commonwealth v. Crowe, 21 Mass. App. Ct. 456, 479 (1986). "To be admitted, 'the additional portions of the statement must be (1) on the same subject as the admitted statement; (2) part of the same conversation as the admitted statement; and (3) necessary to the understanding of the admitted statement.'" Aviles, supra, quoting Commonwealth v. Eugene, 438 Mass. 343, 350-351 (2003).

Here, the redacted portions of the interview largely consisted of cumulative evidence, cross-talk between detectives, multilayered hearsay, and statements which were otherwise irrelevant. The redacted statements were not necessary to the fair understanding of the statements introduced in evidence. Accordingly, the doctrine of verbal completeness did not apply. See Eugene, 438 Mass. at 351 ("the mere fact that the Commonwealth has introduced a portion of the defendant's statement, or the mere fact that the omitted portions are relevant to the case, does not provide a sufficient basis for admissibility").

The defendant's argument that his statements were alternatively admissible must also fail. "None of the assertions was admissible either as a statement of his then

present intent or state of mind because they followed the incident." Commonwealth v. Garrey, 436 Mass. 422, 437 (2002). A statement "purporting to explain past conduct is not admissible under the state of mind exception to the hearsay rule." Bianchi, 435 Mass. at 327. Accordingly, the judge properly excluded the redacted statements of the defendant as inadmissible self-serving hearsay not offered by a party opponent. There was no error.

Judgment affirmed.

By the Court (Green, C.J., Neyman & Henry, JJ.[4]),

Joseph F. Stanton

Clerk

Entered: June 11, 2019.

[4] The panelists are listed in order of seniority.